United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-5023

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN THE MATTER OF

W. T. GRANT COMPANY,

Debtor,

ZARTLEG DEVELOPMENT CORP. ("ZARTLEG"),

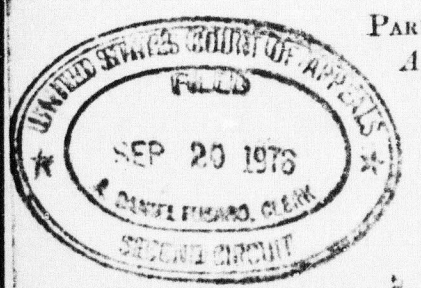
Appellant,

v.

W. T. GRANT COMPANY, THE CREDITORS COMMITTEE, CINNAMINSON SHOPPING CENTER, INC., CHANNEL COMPANIES, INC.,

Appellees.

BRIEF OF APPELLEE CHANNEL COMPANIES, INC.



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BRIEF OF APPELLEE CHANNEL COMPANIES, INC.

Statement of Issues

1. Did the Bankruptcy Court abuse its discretion in reopening the bidding before an order of confirmation was entered?

2. Does Zartleg have standing to seek review by the Court of the orders of the District Court and the Bankruptcy Court?

3. Is this appeal moot since Zartleg failed to obtain a stay pending appeal and the sales have been consummated?

4. May Zartleg obtain reimbursement of alleged expenses in a bankruptcy proceeding?

Introduction

This brief is respectfully submitted on behalf of Appellee Channel Companies, Inc. ("Channel"), the successful bidder for two leases of W. T. Grant Company ("Grant"), as debtor-in-possession, in connection with this appeal by Appellant Zartleg Development Corp. ("Zartleg"), an unsuccessful bidder from an order of Judge Inzer B. Wyatt dated May 17, 1976 affirming three orders of Bankruptcy Judge Galgay which, in essence, confirmed the sale and assignment of the two leases to Channel. By this appeal, Zartleg seeks to have this Court void the sales to Channel, which have resulted in an aggregate payment to Grant in the amount of $280,400, and instead, award the leases to Zartleg for its previously unsuccessful bids aggregating $53,000.

Zartleg's brief in support of this appeal is largely predicated upon its claim that "Channel's motivations in seeking to reopen the bidding were to foreclose entry by Zartleg's affiliate, Builders Emporium, into and to prevent competition in the market areas in question" (Appellant's Brief, page 10) and therefore, "the prices brought at the December 30 and 31, 1975 reopened biddings were not reflective of the fair market value". (Appellant's Brief, pp. 10-11). However, it is demonstrated herein that these contrived allegations of impropriety are wholly without merit mandating an affirmance of the orders below on

the merits, and, in any event (i) Zartleg is not a "person aggrieved by an order of a referee" and therefore, lacks standing to challenge the subject orders, and (ii) this appeal has been rendered moot by reason of Zartleg's failure to obtain a stay of the orders below and the resulting consummation of the sales to Channel.

Statement of Facts and Prior Proceedings

On October 2, 1975, Grant filed a petition for an arrangement under Section 322 of Chapter XI Rules. At the time of this filing, Grant leased and operated approximately 1,070 stores located in 40 states. After the entry of orders authorizing Grant to (i) continue to operate its business and manage its properties as debtor-in-possession and (ii) conduct going-out-of-business sales in and to surrender possession of 579 stores, Grant embarked upon a program to assign the leases of the stores, covered by these orders to parties willing to pay a cash consideration for the assignment and to assume the obligations under the leases. Channel, among others, was solicited by Grant to submit offers to purchase certain of the leases, and prior to December 2, 1975, Channel, by its counsel, in fact, submitted written bids (each in the amount of $20,000) to purchase leases to Grant stores located in Cinnaminson and Cherry Hill, New Jersey.

By order to show cause dated December 2, 1975, (A-8),* the Bankruptcy Court set a hearing for December 11, 1975 on the question of authorizing the sale of certain leases to the "High Bidder" identified in an exhibit annexed to the application for order to show cause (A-12). This exhibit identified Channel as the "High Bidder" for the

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* Refers to pages in Appendix.

Cinnaminson and Cherry Hill leases and indicated that there were no other bidders for these leases. Although the order to show cause alluded to "other persons making a higher and better offer", it did not otherwise give notice that Zartleg or any other bidder would be present at the December 11, 1975 hearing to submit oral bids.

Consequently,—irrespective of its legal significance—Channel was, in fact, unaware that there would be any further bids for the subject leases, and therefore, it did not send to the December 11, 1975 hearing a representative authorized to bid competitively thereon. Nevertheless, Zartleg, a previously unknown bidder, appeared at the December 11, 1975 hearing and submitted oral bids in excess of Channel's prior written bids. Taken by surprise, Channel requested, and was granted a ten-minute recess (A-68), during which time Channel's representative telephoned Louis Slater, Chairman of Channel's Board of Directors, at Channel's executive offices, located in Whippany, New Jersey, in order to request instructions. At that time, Mr. Slater authorized bids on behalf of Channel up to $25,000 for each lease.

When it appeared that the bidding was likely to exceed $25,000, counsel for Channel requested another short recess in order "to obtain further authority" (A-73). This request was denied. Contemporaneously, Channel's representative made a second telephone call to Mr. Slater, who authorized and instructed him to bid whatever was necessary to obtain the two leases. However, when he returned to the courtroom to implement Mr. Slater's instructions, the bidding had been closed with the last bids being Zartleg's in the sum of $26,500 for each lease. Significantly, at the close of the proceedings on December 11, 1975, no order was submitted or signed confirming any sale of these leases to Zartleg. As noted by the Court: "I told

counsel for Grant to submit an order and did not consider anything as being final" (A-81).

Realizing that each of the leases was worth substantially in excess of $26,500, and seeking to avoid the necessity of further applications to the Bankruptcy Court, Mr. Slater thereafter spoke to Solomon Rogoff, President of Vernado, Inc., which is the parent company of Zartleg, and asked if he would consider *selling* Channel one of the subject leases. Mr. Rogoff agreed to consider this request and reply within a day or two. Although Zartleg now claims that by this telephone conversation and Channel's subsequent attempt to reopen the bidding, Channel sought to "foreclose entry by Zartleg's affiliate, Builders Emporium, into and to prevent competition in the market areas in question" (Appellant's Brief, p. 11), it is clear that no such "anti-competitive scheme" has been established by Zartleg, and indeed none can be established in the circumstances of this case.

Thus, Mr. Slater has denied that he ever stated, implied or suggested to Mr. Rogoff that "we could have gotten together about purchasing the two leases" or that "they split the leases" (A-181, 182, par. 5). Moreover, it is undisputed that before Mr. Slater even knew that Zartleg was bidding on stores to be used as a Builders Emporium, he had already instructed Channel's representative to bid as high as necessary to obtain the subject leases. In any event, it was established at the December 30, 1975 hearing (A-88-95) that there are at least four other comparable stores available for lease within a close proximity to the stores in question. Certainly, these sites are readily available to Zartleg or Builders Emporium, and there has been no claim made that either of them has, in any way, been restrained from obtaining these stores. Under these circumstances, it is disengenuous for

Zartleg, whose parent company is "one of the nation's 25 largest retailers with overall sales in 1975 expected to exceed $1 billion (A-165, par. 3) to argue that it could effectively be restrained from competing with a much smaller Channel.*

Therefore, with "motivations and tactics" having nothing to do with any alleged "anti-competitive scheme", Mr. Slater, not having heard from Mr. Rogoff, instructed his counsel "to take whatever steps necessary to reopen the bidding". (A-182, par. 5). Thereafter, before any order was signed confirming the apparent sale to Zartleg, Channel moved by order to show cause, to reopen the bidding on the subject leases. The order to show cause was signed by the Bankruptcy Court on December 24, 1975 and made returnable on December 30, 1975 (A-44). It is notable that Emanuel Halper of the firm of Zissue, Lore, Halper and Robson, then counsel to Zartleg, appeared before the Bankruptcy Court on December 24, 1975 and opposed the signing of the order to show cause. At that time, Mr. Halper reported to the Court the Slater-Rogoff conversation referred to above, and made precisely the same arguments here urged by Zartleg's new counsel (A-175, par. 8). Needless to say, these contentions were then rejected by the Bankruptcy Court.

A full and complete evidentiary hearing was held on Channel's motion on December 30, 1975, with all interested parties represented by counsel. In this regard, Channel (i) presented expert testimony which demonstrated, beyond cavil, that Zartleg's bids, each in the amount of $26,600, were substantially below the fair market value

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* In the year ended January 31, 1975, Channel reported sales of $49,483,229, or approximately 5% of those of Zartleg's parent.

for the subject leases (A-88-95)* and (ii) represented that it was then prepared to bid at least $70,000 for the Cherry Hill lease and at least $35,000 for the Cinnaminson lease (A-3, 35-36). Although Zartleg now argues that the fair market value of each property is equal to its December 11, 1975 bids (Appellant's Brief, p. 12) and that the testimony of Channel's expert was "flawed, inconsistent and irrelevant" (Appellant's Brief, p. 9) it is significant that, at the December 30, 1975 hearing, Zartleg presented no evidence which might tend to contradict the testimony of Channel's expert or establish that its bids of $26,500 represented a fair or adequate consideration for the subject leases; nor is there any such evidence in the record.

Rather, at the December 30, 1975 hearing—and now—the sole support urged for these contentions was the conclusory claim that "the real issue why these people are endeavoring to beat us out of these leases and offer additional amounts over and above the bid that was confirmed at the sale is the fact that they are competitors of ours in New Jersey and stores in that state and were willing to pay more to keep us out of these areas where the two stores are located" (A-80).

Notably, however, no evidence, in support of these allegations, was presented by Zartleg at the December 30,

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* Apart from expert testimony, the undisputed facts establish a value in excess of $26,500. Thus, the Cinnaminson lease is for an approximately 22,000 square foot store at an annual rent of $26,-100 for a term ending January 31, 1981 with four options to renew, each for a period of five years. Similarly, the Cherry Hill lease is for an approximately 25,000 square foot store at an annual rent of $31,000 for a term ending July 31, 1981, with four options to renew, each for a period of five years. While these leases are at rents slightly in excess of $1.00 per square foot, the going rate for comparable properties is in excess of $2.00 per square foot (Tr. pp. 15-22). Considering the length of the subject leases, it is clear that they have a market value substantially in excess of $26,500.

1975 hearing,* and they have, in any event, been demonstrated to be baseless (see *supra*, p. 5).

Based upon Channel's evidentiary showing and the failure of Zartleg to submit any evidence whatsoever in support of its contentions, the Bankruptcy Court—at the December 30, 1975 hearing—noted that "it now appears to the court that someone was going to get a bargain" (A-110) and held that "in the interest of justice and in the estate of W.T. Grant that I open the bidding and I will do so now and invite both parties to do so now" (A-108). In this regard, it is interesting to note that although Zartleg now vigorously defends the Bankruptcy Court's refusal to grant Channel's representative a short recess to obtain further authority to continue the bidding on December 11, 1975, Zartleg, on December 30, 1975 requested and was granted a full day's adjournment of the bidding. Making the same arguments previously made by Channel, counsel for Zartleg urged that he was not "aware that there was a continued auction being conducted here today" and "it would be in the interest of justice to grant a short adjournment for the bidding in view of the large amounts involved for the purpose of getting the authority to come back and continue the bidding" (A-112-113).

The bidding continued and was concluded on December 31, 1975, and both leases were obtained by Channel, the Cherry Hill lease for a high bid of $215,200 and the Cannaminson lease for a high bid of $65,200. Thus, Grant has realized $280,400 on the sale of the two leases,

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* Indeed, the sole "evidence" of these claims is the Slater-Rogoff conversation referred to above (see supra, p. 5), which was not brought out at the hearing. Instead, it was only after Zartleg lost the bidding and the sale to Channel was confirmed that it attempted to regain the properties at its original bids, using this conversation as alleged "new evidence".

whereas it would have only realized an aggregate of $53,000 on a sale to Zartleg. This confirms the Bankruptcy Court's observation that Zartleg "was going to get a bargain", and the manifest propriety of its decision to reopen the bidding.*

On December 31, 1975, two orders were entered confirming the sales to Channel, and Zartleg subsequently moved to "reargue" these orders claiming that there was "new evidence". This alleged "new evidence", however, turned out to be nothing more than the Rogoff-Slater conversation discussed above (*supra*, pp. 5-6), and the Bankruptcy Court, on March 1, 1976, denied the motion on the ground that the alleged "evidence" was not "new" and was, in any event, insufficient, as a matter of law, to support any reconsideration of the December 31, 1975 orders. Moreover, in its memorandum opinion, the Court again explained the reasoning underlying its decision to reopen the bidding, as follows:

> "Hearings were held in this Court on December 11, 1975 at which bidding was conducted for the two leases. At the close of the hearing, I orally awarded the leases to Zartleg for $26,500 each. But during the next two weeks this Court received an Order to Show Cause from Channel, alleging that the leases in issue were worth far more than what the Court had originally agreed to. Since I had

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* It has been stated by Robert C. Grant, Zartleg's president, that "[v]alue of a piece of property is best determined by open bidding among persons willing to purchase the property" (A-52, par. 10). Here, in December 31, 1975, Zartleg, in fact, bid $215,000 on the Cherry Hill lease and $65,000 on the Cinnaminson lease. Under these circumstances, Zartleg cannot argue that the fair market value of these leases was only $26,500, nor dispute the obvious conclusion that they had a substantially higher fair market value.

not yet signed any order authorizing the assignment of the lease to Zartleg. I felt an evidentiary hearing was in order, and such hearing was held on December 30, 1975, with all interested parties present. At that time I was satisfied that Zartleg's bids of $26,500 for each property were substantially below market value for the property. Based upon my conclusion, I decided to reopen bidding for the property. Such bidding was held on December 30, 1975 and continued on December 13, 1975. When the bidding was over, Channel was the high bidder on both leases. The Cherry Hill lease was bid in at $215,000 and the Cinnaminson lease for $65,200, thus confirming my earlier conclusion that the earlier Zartleg bids were too low. Thereafter, I signed orders which confirmed the assignment of both leases to Channel." (A-208)

Although by this appeal, Zartleg seeks review of both the December and March orders, it is of paramount importance that Zartleg neither sought nor obtained, pending appeal, a stay of the orders appealed from. Consequently, the challenged sale and assignment to Channel has long since been consummated and Channel is now in possession of and has paid and continues to pay rent for the subject premises. Under these circumstances, it is not only urged below that Zartleg's appeal must fail on the merits, but also that the appeal is now moot by virtue of Zartleg's failure to take timely steps to avert a completed sale.

POINT I

The Bankruptcy Court's decision to reopen bidding should be affirmed on the merits.

By this appeal, Zartleg, in essence challenges the Bankruptcy Court's decision, made on December 30, 1975, to reopen the bidding on two Grant's leases. This decision was only made after an evidentiary hearing with all interested parties present and was predicated on the Court's finding of fact, based upon the evidence presented, that "Zartleg's bids of $26,500 for each property were substantially below market value for the property." (A-209). Under these circumstances, Bankruptcy Rule 810 mandates that the district court "shall accept the referee's findings of fact unless they are clearly erroneous". It is clear that the Bankruptcy Court's findings were not "clearly erroneous" when viewed in light of the applicable law and the record herein and that the District Court was correct in affirming the Bankruptcy Court and holding that "The BJ was fully justified in declining to sign the orders authorizing sales to Zartleg. As a result, the estate benefited by $237,400". (A-228)

In this connection, Zartleg's brief proceeds throughout upon the patently mistaken assumption that, as a result of its apparent high bid on December 11, 1975, it had acquired a proprietary interest in the premises here involved. However, it is undisputed that no sale to Zartleg was ever confirmed by the Bankruptcy Court. Under these circumstances, it is settled law that "a bankruptcy sale is not complete unless it is confirmed". *Collier on Bankruptcy*, Vol. 4A, Sec. 70.98(17) at 1180. Therefore, a high bidder "before confirmation is not even vested with an equitable title to the property, and he cannot restrict the power of the court" to confirm or set aside

the sale. *In re Klein's Rapid Shoe Repair Co.*, 54 F. 2d 495, 496 (2nd Cir., 1931); see also, *In re Barr Mfg. & Supply Co.*, 217 Fed. 16 (2nd Cir., 1914); *In re Wolk Lead Batteries Co.*, 294 Fed. 509 (6th Cir., 1923). Thus, it is firmly established that confirmation may be denied solely on the basis of inadequacy of price where there is a substantial disparity between the bid or contemplated sales price and the appraised or fair market value, and there is a reasonable degree of probability that a substantially better price will be obtained by a resale.* See, *Reid* v. *King*, 157 F. 2d 868 (4th Cir., 1946); *In re New Strand Theatre*, 109 F. Supp. 350 (S.D.N.Y., 1952); *aff'd.* 201 F. 2d 889 (2nd Cir., 1953), *cert. den. sub. nom. Ratett* v. *Kaplan*, 345 U.S. 995 (1953); *J.J. Sugarman Co.* v. *Davis*, 203 F. 2d 931 (10th Cir., 1953); *Procter & Gamble Mfg. Co.* v. *Metcalf*, 173 F. 2d 207 (9th Cir., 1949); *Webster* v. *Barnes Banking Co.*, 113 F. 2d 1003 (10th Cir., 1940).

The foregoing principles were applied in *In re New Strand Theatre, supra*, wherein petitioner sought review of an order of the referee in bankruptcy which rejected his bid for the purchase of certain of the bankrupt's assets, denied confirmation of the sale to him, and directed the resale of the property to consider higher offers received after the original sale had been concluded, as well as any other bids that might be submitted upon the resale. The petitioner had submitted a bid of $18,700, which, plus liens of $11,750, totalled $30,450. Subsequently, one of the unsuccessful bidders at the sale notified the trus-

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* Although Zartleg claims that "mere inadequacy of price" is not sufficient to deny confirmation, it is clear that "mere inadequacy" refers to a rather slight difference between the highest auction bid and a supervening bid. *Collier on Bankruptcy*, Vol. 4A, Sec. 70.98 (17) at 1190. Certainly, this is not the case here, and the cases cited herein conclusively establish that confirmation may be denied solely based on the disparity present in this case.

tee's attorneys that he desired to increase his bid to $20,000. A few days later another prospective purchaser offered $25,000. Based on the two increased offers, the trustee reversed his prior recommendation that the referee confirm the sale, and urged a reconsideration of bids. The referee subsequently signed an order refusing confirmation of the sale to petitioner and directed a new sale for the following reasons (109 F. Supp. at 551):

> "In light of the substantially increased offer and also in view of the fact that the highest bid reached at the last special meeting that was called did not reach 75% of the appraised value, and particularly in view of the fact that these new offers have been brought to the attention of the court before the confirmation order had been signed, I feel it to the best interests of the creditors that the offer be rejected of Mr. Ratett [petitioner] and a new sale be held and the matter left open for all purposes."

The court pointed out that mere acceptance of the petitioner's bid at the sale did not constitute the requisite approval, and that the signing of an order of confirmation was not a mere ministerial act automatically following the acceptance of a bid (109 F. Supp. at 352):

> "A sale of a brankrupt's assets is a judicial sale, with its own distinguishing characteristics. *Matter of Realty Foundation, Inc.*, 2 Cir., 75 F. 2d 286; *In re Klein's Rapid Shoe Repair Co.*, 2 Cir., 54 F. 2d 495. In the latter case the principles governing such sales were enunciated:
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> "* * * Section 70 of the Bankruptcy Act (11 U.S.C.A. Sec. 110) gives to the District Court the power to confirm or set aside, in its discretion, a

> sale of the bankrupt's property. Such sales are judicial sales which are not complete until confirmed. Until confirmation, even an accepted bid makes the bidder no more than one whose proposal has been recommended. *In re Burr Mfg. & Supply Co.*, 2 Cir., 217 F. 16, 19. Such a bidder before confirmation is not even vested with an equitable title to the property, and he cannot restrict the power of the court under section 70 of the statute. *In re Wolk Lead Batteries Co.* [6 Cir., 294 F. 509] *supra; Bryant* v. [*Charles L.*] *Stockhausen Co., Inc.*, 4 Cir., 271 F. 921. See, also, *The East Hampton*, 2 Cir. 48 F. 2d 542." 54 F. 2d at page 496.

In like measure, in similar circumstances the Court in *Reid* v. *King*, *supra* held (157 F. 2d at 871):

> "The case before us does not relate to the setting aside of a completed sale but to the confirmation of a sale made subject to the court's approval. The concrete problem is whether or not the bidding should be reopened to let in a substantially higher bid. We see no reason why the court in this situation should not be permitted to exercise the authority granted it by the express terms of the statute to approve or disapprove the lower bid; or why the review of its decision on the point should not be limited by the rule which commits such decisions to the sound discretion of the court."*

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* The cases cited and relied upon by Zartleg do not mandate a contrary result. Thus, in *Jacobson* v. *Larkey*, 245 Fed. 538 (3rd Cir. 1917) and *Ballentyne* v. *Smith*, 205 U.S. 285 (1907) the Courts affirmed refusals of confirmation based upon "gross inadequacy of price". In *In re Stanley Engineering Corp.*, 164 F. 2d 316 (3rd

(Footnote continued on following page)

Moreover, it is clear that a Bankruptcy Court, in confirming or disapproving a sale, may exercise a wide range of discretion. As stated in *In re Berry & Moser Const. Co.*, 114 F. Supp. 449, 451 (D. Maine, 1953):

> "The grant or denial of confirmation of a sale by a Referee is, to a great extent, a matter of business administration and practical management, necessarily involving the discretion of the Referee. In this respect, the court 'has a wide margin of action, mainly due to the purely administrative element involved.' Collier on Bankruptcy, 14th Ed. Vol. 4, p. 1580."

See also, *In re New Strand Theatre, supra; In re McGrath*, 226 F. 2d 959 (3rd Cir., 1955); *Prentice* v. *Boteler*, 141 F. 2d 175 (9th Cir., 1944).

Consequently, in order to reverse the discretionary action of the Bankruptcy Court, not only must an abuse of discretion be demonstrated, but in weighing what constitutes an abuse the reviewing court must confine its intervention to only a "very extreme case". This was confirmed in *In re Shea*, 126 Fed. 153 (1st Cir., 1903):

> "When a sale is made subject to confirmation, no title vests until it is confirmed. Under such cir-

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(Footnote continued from preceding page)

Cir. 1947) cert. den. sub. nom. *Root* v. *Galman*, 322 U.S. 847 (1947) there was a strong dissent which observed that the majority had incorrectly substituted its judgment for the lower court's finding of inadequacy. In any event, the majority opinion was criticized by Ogleboy, some developments in Bankruptcy Law, 22 Journal of National Association of Referees, 82, 87 (1948) and appears to be contrary to the weight of authority. See *Collier on Bankruptcy*, Vol. 4A, Sec. 70.98 (17) at 1180-1194. Finally, *Knight* v. *Wertheim & Co.*, 158 F. 2d 838 (2nd Cir. 1946) did not involve bidding such as involved herein.

> cumstances, it is all the more difficult for an appellate tribunal to interfere with the exercise of the discretion of the court of the first instance. If a judicial tribunal authorized to make a judicial sale expressly reserves the right to approve or disapprove, it certainly would require a very extreme case to justify some other tribunal in injecting its own discretion."

See also, *In re Berry & Moser Const. Co., supra; Smith* v. *Juhan,* 311 F. 2d 670 (10th Cir., 1962); *Reid* v. *King, supra.*

Here, the decision to deny confirmation and reopen the bidding was only made after an evidentiary hearing at which all interested parties were present. At that hearing, expert testimony was adduced indicating that Zartleg's bids were substantially below the fair market value of the properties involved, and Channel manifested its intention to bid substantially higher in the event the bidding was reopened (see supra, pp. 6-7). Notably, no contrary or other evidence of fair market value was presented at the hearing either by Zartleg or anyone else. Thus, as a result of the hearing, it was established that there was a substantial disparity between Zartleg's bids and fair market value and that there was a real probability that a substantially better price would be obtained by a resale (see supra, pp. 6-7). Moreover, this was confirmed when (i) Grant realized $280,400 from Channel in contrast to the $53,000 it would have realized from Zartleg and (ii) Zartleg, in fact, bid $215,000 for the Cherry Hill lease and $65,000 for the Cinnaminson lease when the bidding was reopened.

Indeed, Zartleg, in its brief, does not even claim that the Bankruptcy Court abused its discretion. Instead, it is merely claimed that Zartleg's original bids, and not

Channel's ultimate bids represented fair market value. However, Zartleg has never presented any evidence of market value and, in fact, submitted bids substantially higher than its original bids. To the contrary, this contention is solely based upon Channel's claimed "anti-competitive scheme". Nevertheless, any such "scheme" has been denied by Channel and conclusively refuted by the indisputable facts (see supra, pp. 5-6). In any event, it has been established that "while it is clear that a valid antitrust claim should be properly adjudicated, it is equally clear that a bankruptcy court is simply not the proper forum to consider the matter". *In re Harwald Company,* 497 F. 2d 443, 445 (7th Cir., 1974).

In short, the record on this appeal is completely devoid of any evidence which might tend to support the claims here made by Zartleg. On the other hand, the evidence adduced at the December 30, 1975 hearing—as well as other evidence in the record—when considered in light of the fact that Grant has now realized $280,400 instead of $53,000, conclusively demonstrates that the decision of the Bankruptcy Court was not "clearly erroneous" and that there has been no "abuse of discretion", not to mention "a very extreme case". Therefore, it is manifest that the record in this case mandates an affirmance of the orders below.

POINT II

Zartleg lacks sufficient standing to seek review by this Court of the orders of the Bankruptcy Judge.

Section 39(c) of the Bankruptcy Act, 11 U.S.C. Sec. 67(c), limits the right to appeal to a "person aggrieved by an order of a referee".* In this regard, it is plain that the fact that the person seeking review was allowed to participate in proceedings culminating in the particular order does not, standing alone, qualify him. *Rogers* v. *Bank of America Nat. Trust & Sav. Assn.*, 142 F. 2d 128 (9th Cir., 1944). To establish standing as a "person aggrieved" under Section 39(c), "[i]t is necessary for the plaintiff to show that the challenged sale caused him injury in fact as well as that the interest which he seeks to protect through his petition for review is an interest which the Bankruptcy Act seeks to protect or regulate". *In re Harwald Company*, 497 F. 2d 443, 444 (7th Cir., 1974).

Based upon the foregoing, and apart from the question of whether Zartleg has suffered "injury in fact", it is clear that Zartleg lacks standing to prosecute this appeal since it is not within the zone of interests which the Bankruptcy Act seeks to protect or regulate. Thus, the primary objective of the Bankruptcy Act is to minimize the injury to creditors arising from the fact of bankruptcy. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1934). Implicit in the realization of this primary purpose is the presumption that sale by public auction, where

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* Even though Section 39(c) speaks of a "petition for review", the section itself, and the cases decided thereunder, are, nevertheless, applicable since the substitution of an appeal for a petition for review did not change the substantive rights of the parties, being merely procedural. See Bankruptcy Rule 928.

all interested parties can be brought together for competitive bidding, will result in the highest prices which could be obtained on behalf of the creditors for the bankrupt's property, *cf. Shlensky* v. *H.R. Weissberg Corp.*, 410 F. 2d 1182 (7th Cir., 1969). Consequently, it is established that an unsuccessful bidder, whose final bid is below that of the confirmed bid, lacks standing to challenge a bankruptcy sale in this Court. *In re Harwald Company, supra; In re Realty Foundation*, 75 F. 2d 286 (2nd Cir., 1935); *Imperial Bowl of Miami* v. *Roemelmeyer*, 368 F. 2d 323 (5th Cir., 1966); *In re United States Overseas Airlines*, 419 F. 2d 932 (3rd Cir., 1969).*

Moreover, it is of paramount importance, as demonstrated above (supra, pp. 11-12), that Zartleg never became vested with any title or interest—either legal or equitable—in or to the property here involved. Having no interest in the property, Zartleg has no standing to object to the confirmation of the sale or review the order of confirmation. As stated in *In re Realty Foundation, supra* (75 F. 2d at 288):

> "The appellee is not even a person who has made the highest bid, and we know of no theory of law upon which such a person has any standing whatever. A contract with a bidder only arises after his bid has been accepted and the sale to him confirmed."
>
> * * *
>
> "Appellee further seeks to sustain the court below on the novel theory that the latter had disposed of the appeal in accordance with a sound discretion. The difficulty with this is that, in con-

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* Zartleg apparently agrees that an unsuccessful bidder does not have standing (See Point IV, pp. 39-40 of Zartleg's Brief) but takes the Alice in Wonderland view that it was the high bidder.

> firming the sale, the referee acted as a judge of the bankruptcy court with power to hear and determine the matter before him, and the District Judge had no power whatever to make orders in the general interest of the creditors, but stood only in the position of an appellate judge who might review the decision of the referee upon a petition taken by some one having a legal interest in the premises. In our opinion, [appellee] had no such interest and could not properly either object to the confirmation of the sale or review the order of confirmation."

Although, despite the foregoing, Zartleg seeks to invoke the equity jurisdiction of the Bankruptcy Court, it is clear that the Bankruptcy Court's equitable power may only be exercised within the limits of the jurisdiction established by the Bankruptcy Act. *Knox* v. *Lines,* 463 F. 2d 561 (9th Cir., 1972). Plainly, the powers conferred on Bankruptcy Courts by the Bankruptcy Act do not make them courts of general jurisdiction to hear and determine controversies not properly part of bankruptcy proceedings. *In re Love B. Woods & Co.,* 222 F. Supp. 161 (S.D.N.Y., 1963). Here, the claims asserted by Zartleg—i.e., an alleged anti-competitive scheme—are clearly not properly part of the bankruptcy proceeding and beyond the jurisdictional limit of the inquiry of the Bankruptcy Court. This was the holding in *In re Harwald Company, supra,* wherein it was noted (497 F. 2d at 445):

> "A determination by the bankruptcy court of whether sale of a bankrupt's assets to a prospective purchaser would, because of the purchaser's special characteristics, violate antitrust laws could not, contrary to the appellants' contention, properly be considered part of the bankruptcy proceedings. §11 U.S.C. §11. There are sound reasons for this

> result. First, the creditors might be deprived of receiving the highest obtainable price for the sale of the bankrupt's assets at a fully competitive public sale. Second, delay of confirmation of the sale pending a judicial determination of the qualifications of the prospective buyer with respect to antitrust law would not only deny the creditors the present use of proceeds from the sale but would also diminish the amount of proceeds through continuing expenses of the bankruptcy trustee. It is the prospective purchaser, not the creditors, who is best able to assess the legal implications of his special characteristics and who should properly bear the risk of any possible peril attaching to him because of a purchase at a valid bankruptcy sale. See, *In Re Airlines Transport Carriers*, 129 F. Supp. 679 (S.D. Cal., 1955). Thus, while it is clear that a valid antitrust claim should be properly adjudicated, it is equally clear that a bankruptcy court is simply not the proper forum to consider the matter."

Based upon the foregoing, it is clear that Zartleg lacks the requisite standing to object to the confirmation of the sale to Channel or to seek review, in this Court, of the order of confirmation on the grounds asserted.

POINT III

This appeal has been rendered moot by reason of Zartleg's failure to obtain a stay of the sale to Channel pending appeal.

It has been previously noted (supra. p. 10), that Zartleg neither sought nor obtained a stay of the orders appealed from. As a result, the sale and assignment to Channel has now been consummated: Channel has paid $280,400 for the leases here involved, is now in possession of and operating out of the subject premises and has been paying rent therefor. Under these circumstances, this appeal has been rendered moot and the completed transaction cannot, at this point, be reversed.

In this connection, it is settled law that an appeal from an order of a bankruptcy judge does not stay the effect or operation of the order unless a supersedeas bond is filed or the order itself provides for a stay. *Sterling* v. *Blackwelder*, 405, F. 2d 884 (4th Cir., 1969); *Taylor* v. *Austrian*, 154 F. 2d 107 (4th Cir., 1946); *In re Stratford Financial Corp.*, 264 F. Supp. 917 (S.D. N.Y., 1967). Clearly, a stay must be obtained or appellant risks having his appeal rendered moot. As stated in *In re Lewis Jones*, 369 F. Supp. 111, 115-16 (E.D.Pa., 1973):

> "It is clear that a party seeking to avoid any impairment in its ability to realize the benefit of a successful appeal relating to the disposition of a subsidiary portion of the proceedings before the Court must seek to stay the progress of the proceedings by obtaining a stay or injunction pending appeal. Absent the grant of a stay or injunction and the approval of a bond, the status quo of the litigation is not fixed and the litigation is free to continue. Thus a party who chooses to appeal but

> who fails to obtain a stay or injunction pending appeal risks losing its ability to realize the benefit of a successful appeal."

Thus, where a stay has not been obtained, the reviewing court is powerless to undo a completed and consummated transaction. This was made plain in *In re Pure Penn Petroleum Co.*, 188 F. 2d 856 (2nd Cir., 1951) wherein this Court held:

> "We conclude, therefore, that the order authorizing the sale was in error and must be reversed. As there was no stay or supersedeas bond, and as the district court had jurisdiction, if the sale was completed and confirmed before the appeal, the sale cannot be undone, if the purchase was bona fide, i.e., not made indirectly for the debtor or for some other party or parties to the Chapter XI proceeding."

In accordance with these principles, Bankruptcy Rule 805 provides for a motion for a stay of the judgment or order of the bankruptcy judge pending appeal, and Rule 11-62(2), which is amendatory of Rule 805, enunciates the consequences of a failure to obtain a stay pending appeal, as follows:

> "Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal whether or not the purchaser or holder knows of the pendency of the appeal."

These rules have been interpreted and applied, in circumstances analogous to the case at bar, to render an

appeal moot in the absence of a stay. It was thus held in *In the Matter of Abingdon Realty Corp.*, 530 F.2d 588 (4th Cir. 1976):

> "Savage/Fogarty was a good faith purchaser and assumed a substantial obligation to Metropolitan Life, whose mortgage was in default. No stay of the effectiveness of the orders of the bankruptcy judge was sought by A & H, its receiver in bankruptcy, or anyone else, and the sale had been consummated. The appeal from the orders of the bankruptcy judge had become moot, since under these circumstances the district judge could not properly have ordered that the sale be set aside."*

In light of the facts that (i) Zartleg never sought or obtained a stay pending appeal and (ii) the sale and assignment to Channel has now been fully consummated, with full consideration passing and Channel assuming possession of the properties and paying rent therefor, it is clear that, under the authorities referred to above, this appeal has been rendered moot, and the completed transaction may not now be undone.

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* It cannot be convincingly argued that Channel is not, in fact, a good faith purchaser since the purchase was "not made indirectly for the debtor or for some other party or parties to the Chapter XI proceeding." *In re Pure Penn Petroleum Co., supra.* Certainly, no claim that Channel is not a good faith purchaser can be based on Zartleg's claim of an "anti-competitive scheme" since it has been demonstrated that, based upon the record herein, there is no evidence to support such a claim and it is, as a matter of fact and law, wholly without merit.

POINT IV

Zartleg is not entitled to reimbursement of any alleged expenses.

Finally, Zartleg argues that it should "be reimbursed for its outlays until December 24, 1975 when it first learned of appellee Channel's attempt to reopen the bidding" (Zartleg Brief, pp. 30-35). However, it is clear that all of the alleged "outlays" were made prior to confirmation, and therefore, at a time when Zartleg had no interest—legal or equitable—or claim or right in or to the subject properties (supra, pp. 11-12). Under these circumstances, it is settled that if bidders "proceed to improve the property or make expenditures with respect thereto on the assumption that sale will be confirmed to them, they do so at their own risk". 6 Remington on Bankruptcy §2573.3 (at p. 74).

Moreover, the issue of reimbursement for alleged expenses was raised by Zartleg for the first time in the affidavit of Solomon Rogoff (A-164, 168) which was submitted in support of Zartleg's motion to reargue (A-157). Thus, although Zartleg submitted papers in opposition to the reopening of the bidding (A-48-54), it did not seek any reimbursement or raise the issue of alleged expenses in opposition to the reopening of the bidding. It is respectfully submitted that in these circumstances the claim by Zartleg for reimbursement is not properly before this Court.

Finally, it should be noted that an examination of the list of alleged expenses (A-171) makes evident the frivolous nature of the claim. The largest item is "Fixtures fabricated". It is inconceivable that these alleged fixtures, even if fabricated in less than two weeks, have not been used in other stores opened by Zartleg. The remain-

ing alleged "expenses" are clearly the ordinary everyday expenses of Appellant incurred by its regular employees in the regular course of their duties which in no way benefited either Channel or the bankrupt. In any event neither the Bankruptcy Court nor the District Court have ruled that Zartleg cannot collect for these alleged expenses but have only held that this proceeding is not the proper one in which to pursue its claims. Clearly, Zartleg can bring a plenary action for reimbursement if it so desires.

Placed in this posture, it is clear that the cases cited and relied on by Zartleg are inapposite. Thus, *Mesirow* v. *Duggan*, 240 F. 2d 751 (8th Cir., 1957) involved a sale which had been voided *after confirmation*. Similarly, *The East Hampton*, 48 F. 2d 542 (2nd Cir., 1931) was an admiralty, and not a bankruptcy case wherein the relief alluded to was granted as against the vessel owner and not another bidder. In any event, both cases dealt with permanent improvements which are not here claimed. Consequently, it is clear that Zartleg is not, in the circumstances of this case, entitled to be reimbursed for any of its alleged "outlays".

CONCLUSION

By reason of the foregoing, it is respectfully submitted that the orders appealed from be, in all respects, affirmed.

Respectfully submitted,

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Services of three (3) copies of

the within BRIEF is

hereby admitted this 20th day

of SEPTEMBER, 1977

Lorraine J. Stevens

[redacted] for ZISSU LEVY HALPER

SECRETARY & BARRON